

REMARKS

Status of Claims

Claims 2-8, 9-11, 18, 23-25, 27-29, 31, 33-35, 37-38, 40 and 41 are pending.

Claims 26 and 30 are canceled herein without prejudice or disclaimer.

Claims 38, 40 and 41 are amended herein.

Claim Rejections

The Examiner has rejected claims 2, 7, 9-11, 18, 23-31, 33-35, 37, 38, 40 and 41 under 35 U.S.C. §103(a) as allegedly unpatentable over U.S. Patent No. 6,224,851 ("Bara") in view of Occupational Safety and Health Administration data on ethylperfluorobutyl ether (OSHA data sheet), U.S. Patent No. 6,528,070 ("Bratescu"), and U.S. Patent No. 2,859,085 ("Morrisou").

Briefly, the Examiner contends that Bara "teaches cosmetic water-in-oil emulsion foundation comprising 20% by weight of perfluomethylcyclopentane." The Examiner contends that Bara teaches that perfluomethylcyclopentane can be replaced with ethylperfluorobutyl ether, for which the Examiner cites the OSHA data sheet as teaching a vapor pressure of "109 mmHg (145.32 mbar) at 25°C." The Examiner acknowledges that Bara "does not teach the specific viscosity of the composition" but cites Bratescu as teaching "that the viscosity of cosmetic emulsion composition can vary from thin as 100 cps, to cream like consistency of 80,000 cps" and thus contends that "formulating the Bara composition in the viscosity range as taught by Bratescu would have been obvious to the skilled artisan." The Examiner further acknowledges that the foregoing combination of references "fail to teach a system comprising a container and a sealable and removable cap" but relies on Morrisou as teaching "that containers for facial creams are conventionally in the form of jar and removable lid." Finally, the Examiner states that "[w]hile Bara does not indicate 'the textured appearance' of the composition, examiner views that the prior art composition which contains the same volatile component in the same emulsion form as applicant's invention necessarily possesses the same texture characteristic" as recited in the claims. Applicants traverse these rejections.

As clearly demonstrated in the "Third Declaration under 37 C.F.R. §1.132" of inventor Mark Garrison submitted in conjunction with the Request for Continued Examination of June 15, 2007, the formulation described in Example 2 of Bara is not self-renewing. Accordingly,

Applicants submit that Bara, whether taken alone or in combination with the other cited reference, does not render the claimed subject matter obvious because it does not meet this limitation of the instant claims. Having tested the composition of Bara (Example 2) and demonstrated that it is not self-renewing -- in clear contrast to the instant claims -- Applicants submit that it is not necessary to establish unexpected results of the claimed subject matter, as Bara is clearly deficient. The Examiner is reminded that MPEP §716.02(e) provides that Applicants are only required to compare the claimed subject matter with the closest prior art, not with the subject matter based on “the combination of references relied upon in the rejection of the claimed invention.” See In re Geiger, 815 F.2d 686, 689 (Fed. Cir. 1987); In re Chapman, 357 F.2d 418 (CCPA 1966) (requiring applicant to compare claimed invention with polymer suggested by the combination of references “would be requiring comparison of the results of the invention with the results of the invention”).

Moreover, the fact that Bara’s composition is not self-renewing highlights the fact that the rejection is impermissibly based on hindsight, because it is only with the knowledge that compositions having self-renewing textured surfaces are possible, as provided by the instant application, that the Examiner is able to look to disparate teachings from various references to allegedly arrive at the claimed subject matter.

While Applicants submit that the fact that Bara’s compositions are not self-renewing is alone sufficient to overcome all rejections, the claims have been amended to recite that the perfluoroether component of the composition is present at levels far lower than the 20% by weight of Bara’s Example 2, viz., “about 0.1% to about 10% by total weight of the composition.” (Support for this amendment is found on page 11, lines 11-19 of the specification and Examples I, II and III). In view of this amendment, which draws a clear distinction between Bara’s Example 2 and the instantly claimed subject matter, Applicants respectfully request reconsideration and withdrawal of the rejections.

Having distinguished the independent claims from the art of record, Applicants submit that the claims dependent therefrom are patentable for at least the same reasons. However, Applicants reserve the right to separately address the patentability of the dependent claims in the future, should that be necessary.

CONCLUSION

Applicants respectfully submit that the instant application is in condition for allowance. Entry of the amendments and an action passing this case to issue is therefore respectfully requested. In the event that a telephone conference would facilitate examination of this application in any way, the Examiner is invited to contact the undersigned at the number provided.

Respectfully submitted,

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